No. 15230

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

MORGAN STIVERS,

Appellant,

vs.

NATIONAL AMERICAN INSURANCE COMPANY, a Corporation, *et al.*,

Appellees.

APPELLANT'S REPLY BRIEF.

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TOPICAL INDEX

TABLE OF AUTHORITIES CITED

Cases

Statutes

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Preliminary Statement.

In appellant's opening brief we attempted to set forth in full detail the facts elicited at the trial and the authorities which we believe demonstrate that on the law applicable to those facts:

1. The insured premises were occupied at the time of the fire, and

2. Further, that there was compliance with an agreement by the insured with the insurers acting through their respective agents regarding occupancy.

Appellees have utterly failed to deal with the full facts contained in the transcript and set forth in the opening brief (which facts were in the main undisputed), to directly answer the contentions made, or to analyze or dispute any of the authorities relied upon by appellant.

Appellees contend that there is only one issue before this court, to wit, the sufficiency of the evidence to support the findings that (a) the insurance contracts were suspended by reason of unoccupancy, and (b) Truman B. Stivers was an agent of appellant.*

We submit that this case was not decided by the trial court on the basis of a simple weighing of contradictory evidence. The opinion of the trial court reflects that it was decided upon interpretation of the insurance contracts and the applicable law, and the position of appellant is that the interpretation of the contracts and the law by the court was erroneous.

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*Appellees have utilized the technique in their brief herein of continually referring to Truman B. Stivers as "Nephew," apparently attempting to insinuate the existence of some collusion between appellant and Truman B. Stivers. As we pointed out in appellant's opening brief, there is no evidence whatsoever in the record that the placing of the insurance involved in this action was anything other than an arm's length business transaction, in which customary business routine was followed, and the relationship of Truman B. Stivers to the appellant would seem to be wholly immaterial and not properly usable by appellees to attempt to "color" the transaction.

ARGUMENT.

I.

Appellees Have Misstated Facts and Omitted Pertinent Facts.

It would serve no useful purpose to detail once more the evidence set forth in the record and referred to in Appellant's Opening Brief (App. Op. Br. pp. 2-9, 20-28). Appellee's error with respect to the facts is primarily one of omission, based upon their appraisal that the only substantial problem before the trial court was that of weighing conflicting evidence, not of applying law to a substantially undisputed factual situation. Appellees pick and choose certain evidence which they believe favors them, draw their own conclusions therefrom and say there was evidence to support the judgment, turning away from and ignoring the evidence and law which we believe pertinent to a consideration of this cause.

But appellees indulge in misstatement as well. For example, the conclusion that "Appellant has admitted that he knew the phrase 'occupied' meant that he had to operate the packing plant; otherwise, there would be no insurance protection, or his insurance would be in jeopardy" (Br. of Appellees p. 33) is a mischaracterization of appellant's testimony [Tr. pp. 119-120, 125, 128, 143] exemplified by the cross-examination of appellant at page 125:

> "Q. Now, did you know prior to this fire that your insurance would be jeopardized if the property was not being operated as a packing plant? A. No, because Truman Stivers at the time the policies were

placed on there and long before that, that there had to be someone living on the property and which we had someone living there."

Appellees also refer to a provision of the insurance contracts that "Nothing herein contained shall be construed to modify *any provision* or warranty of this policy *requiring* (1) the maintenance of *watchman service*." (Br. of Appellees, p. 5.) They then argue that "In the absence of a continuous watch, the insurance is suspended during the watchman's absence." (Br. of Appellee's, p. 30.)

In both the decisions cited in support of the contention (*McKenzie v. Scottish Union & Nat'l Ins. Co.,* 112 Cal. 548 and *Delta Lumber and Box Co. v. Lobugh,* 64 Fed. Supp. 51, 52) the courts were dealing with policies containing an express warranty by the insured, to wit, the so-called "watchman's endorsement," wherein the assured warranted that during the time the buildings or works were idle or *not in operation* one or more watchman should be on duty constantly day and night. The court recognized in the *McKenzie* case that under California Civil Code, Section 2629 (now Ins. Code, Sec. 533), the insurer would not be absolved by reason of negligence on the part of the watchman. In this case there was no watchman's endorsement on any of the policies. That express warranty was not exacted, and appellees cannot read the express warranty into the policies.

II.

The Contention That the Premises Must Be in Operation to Be Occupied Is Contrary to the Authorities. It Is Also Contrary to the Parties' Understanding.

A. "Occupied" and "Operated."

Setting aside for the time being consideration of the agreement as to occupancy made by the parties, we think appellees' position, which seems to be that "occupied" is synonymous with "in operation," is contrary to law.

The problems of "operation" and "vacancy and unoccupancy," while related, are clearly distinguishable, and are frequently dealt with in separate portions of, or riders to, a fire insurance policy. They are also separately dealt with by the courts. (See *National Reserve Ins. Co. of Illinois v. Ord* (1941, 9th Cir.), 123 F. 2d 73, 74.) In the authorities cited by appellant in our opening brief, the question of whether the property was in use or operation at the time of the fire did not determine the question of whether the property was occupied. (App. Op. Br. pp. 9, 12-19, 39-43.) Factually, there was no express warranty or requirement of the policies here sued upon that the premises be "used" or "operated"; only that they be "occupied." Furthermore the policies themselves distinguish "use" from "occupancy" in Paragraph 23 of the Building, Equipment and Stock Endorsement, Form 78, which provided in part as follows:

> "23 PERMITS AND AGREEMENTS CLAUSE: Permission granted: (a) For such use of the premises as is usual and incidental to the business conducted therein and for existing and increased hazards and for

> change in use or occupancy except as to any specific hazard, use, or occupancy prohibited by the express terms of this policy or by any endorsement thereto . . ."

As was stated in *Silver v. London Assurance Corp.*, 61 Wash. 593, 112 Pac. 666, 668:

> "It is said that the word 'occupied' should be given its ordinary and popular meaning, and, as applied to this building, means such occupancy as ordinarily attends or is exercised over a saloon building while being used as such. The vice of this position is that the policy does not provide that the building shall be devoted to saloon purposes. The words 'occupied as as a saloon' are words of description only. As was said in Burlington Insurance Company v. Brockway, 138 Ill. 644, 28 N. E. 799: 'If the company desired to make its liability contingent upon the continued occupancy of the house as a dwelling, it would have been very easy and natural to have stated that among the other conditions expressed.' "

Appellees rely upon *National Reserve Ins. Co. v. Ord, supra* (1941, 9th Cir.), 123 F. 2d 73, for the contention that "occupied" here means "operating," and for the further contention that the meaning of "unoccupied" is clear. (Br. of Appellees, pp. 18, 20.) Yet the facts of the *Ord* case and the problems considered by the Court were quite different from those here presented. In the *Ord* case it was admitted that the packing plant was not occupied, that part of the machinery, motors, conveyances, etc. had been removed by the owners and by theft, that the place had been ransacked by children and had become the abode and sleeping place of tramps, and before the fire the last of the packing equipment had been

removed. With no one living on the property, the Court dealt only with a rider to the policy granting permission "to shut down or cease operations as the occasion may require."

The opinion declared at page 74:

> "Insured asks us to construe the words 'shut down or cease operations as the occasion may require' as meaning, in effect, that though there was no operable packing plant in existence, much less one in operation, when the policy was delivered, nor at any time thereafter, which could cease operations or shut down, nevertheless the unoccupied and tramp infested building was insured by the policy. We cannot agree. Insurers were not liable under the policy until it became occupied as a packing plant. Before that time there was no packing plant to 'shut down' or to 'cease operations.'
>
> "We can find no reason to apply the principle that ambiguous phrases in a policy must be construed against the insurer. Here is no ambiguity as to what was to be shut down or cease operations. The permission was not to shut down or cease operations of an empty shed that had no operations whatsoever to shut down, much less packing plant operations. Obviously, the policy cannot be converted into one insuring a structure which never became a packing plant, that is to say, to construe the specific and limited terms of the permission rider as one striking out the clause limiting the insurance to a period during an occupancy as a packing plant."

The Court was there concerned with admitted facts showing no occupancy, and a plant which had been ransacked and was the abode of tramps and was not in operable condition. Such was not the case here where

an operable and fully equipped plant was occupied by a family living on the property, who prevented others from coming on the place and thus served the purpose that this Court believed was necessary in the *Ord* case to cause the premises to be insured. Also, contrary to the implications of appellees, the language of the policies referred to by the Court in the *Ord* case as unambiguous was that concerning the meaning of "shut down or to cease operations."

Nor are the other authorities cited by appellees on this point controlling, since in each case the courts dealt with the factual situation there presented to determine whether the premises were occupied. *Northwestern Nat'l Life Ins. Co. v. McFarlane,* 50 F. 2d 539, cited by appellees as supporting the contention that the packing plant must be in operation, not merely "occupied," does not support that contention, but deals with a residence left vacant, and the question of whether the company had waived the vacancy provisions or was estopped to assert them by reason of representations of the agent. In passing on the latter point, we may note that that case was decided in 1931 and the Court did not apply California law, which holds that a local agent may by parol waive conditions in an insurance policy, or bind his principal to an oral agreement, irrespective of a provision of the policy that any waiver or permission must be in writing. (See App. Op. Br. pp. 28-34.)

The quotation at page 20 of Brief of Appellees from *Sternberg v. Merchants Fire Assur. Corp.* (1934), 6 Fed. Supp. 541, is a quotation of a statement made by the insurer's counsel in that case which the court therein approved without reference to authorities, but the facts

elaborated on by the Court show an aggravated situation in which the trial court found that plaintiff's son, who was supposed to be caretaker, was the incendiary. *Connecticut Fire Ins. Co. v. Buchanan,* 141 Fed. 877, also relied upon by appellees involved express policy provisions insuring a building as "a normal school and dwelling" and "occupied and only while occupied as a normal school and dwelling" and the court pointed out at page 882:

> "No one was actually living in the building, and it was not the home or abode of any one who was only temporarily absent."

Foley v. Sonoma County Farmer's Mutual Fire Ins. Co., 18 Cal. 2d 232, a decision for the insured, does not support the proposition that the building must be operated, but merely holds that a dwelling is occupied despite the absence of the owners for 13 days.

B. Appellees' Contention That Occupancy by a Family Living in a Trailer on the Property Does Not Make the Packing House Occupied Is Contrary to Law.

Home Ins. Co. v. Hancock, 106 Tenn. 513, 62 S. W. 145. (House "occupied" by cropper living in rooms about 36 feet from the insured dwelling house.)

Sierra M. S. & M. Co. v. Hartford Fire Ins. Co., 76 Cal. 235. (Mill "occupied" although watchman not in building at time, his absence being at most negligence on part of watchman for which assured not responsible under California Code.)

Here the agreement was that there should be someone living on the property. It would seem unreasonable that such persons should be expected to live in the packing house which was not constructed as a living quarters.

Furthermore, there were several buildings on the property, all covered by the policies, and the Morris trailer was located on appellant's property between the insured buildings where observation of all was possible. [Deft. Ex. 1.]

The two decisions relied upon by Appellees *Rossini v. St. Paul Fire & Marine Ins. Co.,* 182 Cal. 415 and *Farmers Fire Ins. Co. v. Farris,* 224 Ark. 736, 276 S. W. 2d 44, do not support appellees' position.

In the *Rossini* case, the policy contained a provision that the company was not liable for loss while there was kept on the described premises gasoline exceeding one quart. Judgment for the defendant insurer was reversed for various erroneous findings, including a finding that gasoline kept in a tank on a separate lot not owned by insured six feet from the insured building and fourteen feet below the surface violated the policy provision.

We may note that (1) the case did not involve the question of "occupancy"; (2) The decision on appeal was in favor of the insured and the court declared at page 424: "The burden is on the insurer to plead and prove affirmatively that there has been a violation of the provision increasing the hazard"; (3) The agent insurer was aware of the fact that gasoline was kept on adjacent premises which were not owned by the insured at the time of the fire. The decision is clearly one resolving questions in favor of the insured and placing the burden of proof squarely upon the insurer.

The *Farmers* case, involving a house and barn, decided that it was erroneous to instruct the jury that so long as either of two separately insured buildings, a house and barn, was occupied, the other was occupied. The reason given was that the policy spoke specifically of vacancy

of a "described building" rather than vacancy of "premises." The court distinguished an earlier Arkansas case which held the insured was entitled to recover where one of two houses was occupied, on the ground that the policy insured the "premises." (*McQueeny v. Phoenix Ins. Co.*, 52 Ark. 257, 12 S. W. 498.) Here the policies refer variously to "building," "building and contents," "above described premises."

C. The Contention Ignores the Agreement of the Parties.

It would serve no useful purpose to elaborate once more the evidence which shows that appellant in good faith, and pursuant to his understanding with the duly authorized agent for appellees National American and Girard, which information and understanding was imparted to the duly authorized agent for appellees Queen and Pennsylvania, placed a family to live upon the property for the express purpose of keeping his insurance in effect. (App. Op. Br. pp. 6-9, 21-28.)

That agreement was made with full knowledge that the plant was not in operation at the time the insurance was placed and with full knowledge that the property was to be occupied in accordance with the understanding of the parties. The subsequent checking by the agent Truman Stivers to make sure that somebody was living on the property and the fact that Pacific Fire Rating Bureau apparently inspected the property after the placing of insurance at the request of the general agents for National American show a satisfaction by appellees with appellant's performance.

III.

Appellees Fail to Deal With Section 533 of the Insurance Code of the State of California.

Appellees argue that a "watchman" was not maintained at all times. The authorities cited by appellees all involve an express warranty, the so-called "Watchman's Endorsement" which is a standard form in policies in the form of an express warranty to the effect that when the premises are not in operation, day and night watchmen will be required, and requiring certain duties and functions on the part of the watchman.

Here the understanding was that someone would be living on the property with no express warranty as to his duties and functions. It appears that the Morris family did in fact keep interlopers off the property. On the other hand, although Mrs. Morris testified one of the family was there all the time, it appears that on the day of the fire, all three had left their trailer and gone to work.

As was stated in *Sierra M. S. & M. Co. v. Hartford Fire Ins. Co., supra,* 76 Cal. 235:

> "To us this seems nothing more than an allegation of negligence upon the part of the watchman, and for this plaintiff was not responsible under section 2629 of the Civil Code." (Cal. Ins. Code, Sec. 533.)

IV.

Under California Law Appellees Were Bound by the Knowledge and Agreements of Their Agents.

We urge that on the evidence it is clear that Truman Stivers and Roy McMillan were duly authorized agents of appellees and were acting as such agents in the placing of this insurance. (App. Op. Br. pp. 20-28.)

The principal thrust of appellees' challenge of our position appears to be based upon the fact that the standard policy contains the following requirement, as set forth in Insurance Code, Section 2071:

"Waiver provisions

> "No permission affecting this insurance shall exist, or waiver of any provision be valid, unless granted herein or expressed in writing added hereto. No provision, stipulation or forfeiture shall be held to be waived by any requirement or proceeding on the part of this company relating to appraisal or to any examination provided for herein."

But California law is clear that, despite such provision in the policies, an insurance agent, having authority such as that held by Truman Stivers and Roy McMillan herein, may bind his principal to an oral agreement or waiver irrespective of this provision of the policies. (See authorities cited in App. Op. Br. pp. 28-30.) *Wilson v. Maryland Casualty Co.,* 19 Cal. App. 2d 463, 467, relied upon by appellees, involved

> "a soliciting agent and [who] had no authority, actual, or ostensible, to waive any of the conditions of the policy; he had no authority to consummate the

> contract and issue a policy of insurance. All the authority he possessed was to take the application, transmit it to the defendant, and when it was returned, deliver it to the plaintiff."

Neither McMillan or Truman Stivers was so limited. Both held agency agreements and had full power to consummate contracts and to bind their principals to oral agreements.

Conclusion.

Appellees assert a hard doctrine which would deprive an insured of coverage for which he had paid and which he had every reason to expect would be provided. They have not directly answered the contentions of appellant nor have they disputed appellant's factual statement or his authorities. Instead they seek to withdraw within the rule respecting sufficiency of the evidence and to bring forth authorities which we sincerely believe do not negate appellant's right to recover.

We therefore respectfully urge that the judgment be reversed.

Respectfully submitted,

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